

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

11	DUSTIN LEON MILLER,	)	Case No.: 1:20-cv-01039-JLT (HC)
12	Petitioner,	)	
13	v.	)	ORDER DIRECTING CLERK OF COURT TO
14	TUOLUMNE COUNTY SUPERIOR	)	ASSIGN DISTRICT JUDGE
15	COURT,	)	
16	Respondent.	)	FINDINGS AND RECOMMENDATION TO
		)	DISMISS PETITION WITHOUT PREJUDICE
		)	[10-DAY OBJECTION DEADLINE]

Petitioner filed a Petition for Writ of Habeas Corpus along with a letter on May 22, 2020 in the United States District Court for the Northern District of California. (Doc. 1.) On the same day, the clerk sent Petitioner a blank Petition for a Writ of Habeas Corpus form and a blank copy of the court's Prisoner's Application and Declaration to Proceed In Forma Pauperis. (Docs. 3, 4.) On July 8, 2020, Petitioner filed another letter, which appears to be a duplicate of the previously filed letter combined with the initially filed petition. (Doc. 8.) The Northern District transferred the petition to this Court on July 24, 2020. (Doc. 9.)

After conducting a preliminary review of the petition, on August 4, 2020, the Court found that to the extent Petitioner is seeking to file a habeas petition in this Court, a preliminary screening of the petition revealed that the petition failed to present any cognizable grounds for relief or any facts in support, failed to demonstrate exhaustion of state remedies, failed to name a proper respondent, and Petitioner failed to sign the petition under penalty of perjury. (Doc. 13.) Accordingly, the Court

1 dismissed the petition with leave to file a first amended petition.

2 On October 15, 2020, Petitioner filed a notice of voluntary dismissal in which he states that he  
3 does not believe he has exhausted his state judicial remedies and requesting that the Court dismiss his  
4 petition without prejudice. (Doc. 19.) Respondent has not yet filed an answer to the petition.

5 Pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, “the [petitioner] may  
6 dismiss an action without a court order by filing: a notice of dismissal before the opposing party serves  
7 either an answer or a motion for summary judgment . . . .” Pursuant to Rule 12 of the Rules  
8 Governing Section 2254 Cases, “[t]he Federal Rules of Civil Procedure, to the extent that they are not  
9 inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these  
10 rules.”

11 In this case, Respondent has not yet filed an answer or other responsive pleading. Therefore,  
12 under Rule 41(a)(1), the petition must be dismissed without prejudice. The Court expresses no opinion  
13 with respect to the timeliness of the instant petition or any future petition. Nevertheless, Petitioner is  
14 advised that there is a one-year statute of limitations period governing the filing of federal habeas  
15 petitions which commences upon the conclusion of direct review. 28 U.S.C. § 2244(d). The statute  
16 may be tolled while Petitioner seeks relief in the state courts, see 28 U.S.C. § 2244(d)(2), but it is not  
17 tolled for the time a habeas petition is pending in federal court. Duncan v. Walker, 533 U.S. 167, 181-  
18 82 (2001).

### 19 ORDER

20 The Clerk of Court is DIRECTED to assign a District Judge to the case.

### 21 RECOMMENDATION

22 For the foregoing reasons, the Court RECOMMENDS that the petition be dismissed without  
23 prejudice.

24 This Findings and Recommendation is submitted to the United States District Court Judge  
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
26 Rules of Practice for the United States District Court, Eastern District of California. Within ten days  
27 after being served with a copy of this Findings and Recommendation, Petitioner may file written  
28 objections with the Court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendation.” The Court will then review the  
2 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to  
3 file objections within the specified time may waive the right to appeal the Order of the District Court.  
4 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5  
6 IT IS SO ORDERED.

7 Dated: October 20, 2020

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE